THE NEW PROSECUTION ARRANGEMENTS
(1) The Crown Prosecution Service

by Francis Bennion

A prosecution system deploys what may be called the prosecutive power of the state, or the power to put persons on trial. This power is ***sui generis***, all other constitutional functions being qualitatively distinguishable. It is of crucial importance. Whatever the outcome, being put on trial is a painful affair requiring close regulation.

The system deploying the prosecutive power may be arranged in various ways. It needs to work in a manner both efficient and conforming to public policy regarding law enforcement, twin criteria reflected in the terms of reference of the Philips Commission.[1]

The work involved in the prosecution process can be broken down into three stages: (1) investigation, (2) preparation for trial, and (3) court presentation. At each stage various decisions, distinguishable as either policy decisions or operational decisions, require to be taken by those involved.[2]

Policy decisions are those which bear on what is referred to above as public policy regarding law enforcement. The most obvious policy decision is whether, there being sufficient evidence for conviction, a particular suspect should or should not be prosecuted.

Operational decisions are those which, in the light of the taking of a particular policy decision, enable the policy to be carried into practical effect. Thus if the policy decision has been taken to investigate a particular alleged offence, the investigating officers will need to take operational decisions about the way the investigation is to be carried out. If the investigation yields sufficient evidence and it is decided to prosecute the suspect, the prosecutor will need to take operational decisions about how the case is to be handled.

Broadly, operational decisions pose questions as to efficiency, turning on specialist expertise. Policy issues raise diffuse problems which, if not always more technically complex, are often more difficult to resolve (or even formulate).

The success of the new system about to be set up under the Prosecution of Offences Act 1985 will be judged by how far it meets these tests of efficiency and conformity with public policy. Before outlining the new system, it is desirable to pave the way by examining these criteria more closely and analysing the reasons why it was thought the existing arrangements failed to match them.

The twin criteria: (1) efficiency

The present prosecution system in England and Wales, having grown up in an undirected fashion over the centuries, is notoriously ramshackle. At its heart lies the tenet that it is for the citizen to set in motion the criminal law. The state apparatus that of necessity grew up round this increasingly unrealistic idea lacked an accepted rationale. Instead we have accustomed

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[1] *Report of the Royal Commission on Criminal Procedure 1981* (Cmnd. 8092) [hereinafter referred to as '*Report*'], page vi.

[2] The Philips Commission found the decision to prosecute a complex phenomenon: '[It] is not a single intellectual act of a single person at an identifiable moment in the pre-trial process but . . . is made up of a series of decisions of a widely different kind made by many people and at different stages in the process' (*Report*, para 6.30).

ourselves to the fiction that the police, who prosecute in the vast majority of cases (either directly or through prosecuting counsel and/or solicitors), do so as private persons.

Superimposed in later times is the Director of Public Prosecutions (D.P.P.), whose office was first set up by the Prosecution of Offences Act 1879. Superimposed on *him* are the Law Officers. So far as concerns England and Wales, the prosecutive power of the state is primarily vested in the Attorney General. That officer can always start a prosecution and, by the use of the *nolle prosequi*, can always end one.[3]

Efficiency partly depends on ability to pursue a consistent course. This may be difficult where, on the same matter, two or more decision-takers are involved. There is obvious risk of inconsistency, even contradiction, when the various decision-takers are in different official organisations.

Under the present system the police take most of the policy decisions. The procedure begins with what the Philips Commission called 'the first decision maker, the officer on the street'.[4] When that officer decides to take no action, the possibility of prosecuting ends forthwith.[5]

If investigation does go on, the officer may be called on to make a policy decision whether to arrest the suspect or report him or her for process, i.e. with a view to the issue of a summons or caution. In the former case the next policy decision might rest with the station sergeant or custody officer, deciding whether or not to accept the charge.[6] In the latter case the officer's superior will decide whether the suspect should be cautioned or summoned.[7]

This charge-or-report procedure, which will continue under the new system, has the paradoxical effect that decisions as to the prosecution of the more serious offences are taken, often in haste, by the charging officer (normally of the rank of sergeant), while the question of prosecuting less serious offences is considered at greater leisure by a more senior officer, perhaps with the advice of a member of the local prosecuting solicitors' department (in future a C.P.S. prosecutor).

Sometimes, even though the prosecution remains in the hands of the police, the consent of the D.P.P. or a Law Officer is, under statute, required. If this is withheld, police work on the investigation will be wasted. A few police forces have continued without a prosecuting solicitors' department, a practice which tends to increase the amount of wasted investigative work.[8]

Once the case gets to court, the prosecution's advocate, whether barrister, solicitor, or police officer, in practice assumes virtually the entire decision-making role.[9] From then on the case is in his charge.

Except where he is a police officer, the advocate is not strictly 'the prosecutor', for that role remains with the police or D.P.P. as client.[10] In theory the police or D.P.P. client can at the

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[3] Note however that the D.P.P. claims to act in de facto independence of the Law Officers (see p. 11 below).

[4] Report, para. 6.31

[5] This is termed 'no-criming'. There are a number of possible reasons for it: see Andrew Ashworth, The English Criminal Process: a Review of Empirical Research (Oxford 1984) 12-18.

[6] The Philips Commission proposed that the present alternative methods of initiating the prosecution process, namely by charge or summons, should be replaced by a single procedure to be known as an 'accusation' (Report, para 8.4). This has not been acted on.

[7] Not, as seems to be creeping in, 'summonsed'.

[8] An example attracting some notoriety occurred in October 1985, when after no fewer than 28 suspects had been arrested at various times for 'cottaging' during a lengthy surveillance by the Bedford police of public lavatories in a local park, the D.P.P, on being asked for his consent to prosecution, held there was insufficient evidence to prosecute any of them.

[9] In committal cases the prosecuting solicitor usually appears in the magistrates' court, thereafter (if committal is ordered) preparing instructions for counsel to prosecute in the Crown Court

court stage do little to impose his will except threaten to withdraw instructions (always the ultimate sanction). In practice differences are usually resolved less drastically.[11]

The prosecution advocate acts on behalf of the Crown, in whose name all prosecutions are conducted.[12] He does this as a minister of justice.[13] The police always retain an operational role in relation to the presentation of the case (for example in collecting further evidence, marshalling witnesses, and looking after exhibits). This will continue under the new arrangements.

Criticisms of efficiency

The number and variety of people involved in taking the various policy and operational decisions under the present system leads to inefficiency, the Philips Commission found. They cited as 'just a few' examples: 'Delays in preparing cases for trial with consequent court adjournments, inadequately prepared cases leading to their early collapse, and the employment of professionals upon tasks for which they are not trained . . .'[14] One major cause of inefficiency cited by the Commission related to variations in connection with prosecuting solicitors' departments:

> 'Not all forces have prosecuting solicitors' departments. In those that do, the status, size and function of the departments differ widely. Some report to the county council, some to the police authority; some control their budgets and staffing, others do not; funding arrangements differ; some prosecute all cases in magistrates' courts, others only a proportion; a few advise the police on the prosecution decision in all cases, others do so rarely.'[15]

One frequent complaint concerns the high proportion of acquittals under the present system. There is a tendency to think that acquittal indicates inefficiency. If the prosecution was competently conducted, why did it fail?

This simple question masks a number of fallacies. In a civilised state, prosecutions do not 'succeed' or 'fail'. Witnesses do not always come up to proof, and sometimes fail to appear altogether.[16] It is for the jury, not the prosecutor, to determine the facts, and the prosecutor is not required to be a clairvoyant.[17]

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[10] Even where the advocate is a police officer technically the prosecutor may be a more senior police officer, perhaps the Chief Constable himself. The wording of the Prosecution of Offences Act 1985 s. 3(2)(a) (see p. 12 below) suggests that it is the relevant police force as a whole that is the prosecutor, but this is constitutionally inaccurate.

[11] A common cause of dispute within the prosecution team is the question of acceptance of a guilty plea to some lesser charge. Here differing views may be taken by (1) the investigating officer, (2) the prosecuting solicitor, (3) prosecution counsel, and (4) a senior police officer occupying the role of the prosecutor.

[12] 'By our constitution, the King . . . sustains the person of the whole community, for the resenting and punishing of all offences which affect the community . . .': Wilkes (1768) Wilm. 322, per Wilmot C.J. at p. 326 (emphasis added).

[13] Puddick (1865) 4 F. & F. 497, per Crompton J. at p. 499.

[14] Report, para. 6.61.

[15] Report, para. 6.63.

[16] Stephen Brown L.J. remarked when at the Bar that the introduction of 'paper committals' under the Criminal Justice Act 1967 s. 1 (now the Magistrates' Courts Act 1980 s. 6(2)) had been detrimental in this respect: 'Section 1 committals do not provide the testing out of the witnesses which is the case with a 'full' committal procedure. Nowadays one does not know whether a witness can really speak to the matters referred to in the documents, and cases do arise where there are gaps in the evidence': Institute of Judicial Administration: Edited Transcript of the Proceedings of a Conference on the Prosecution Process held at the University of Birmingham in April 1975 pp. 5-6).

[17] The Philips Commission said: 'Not all acquittals either by the magistrate or jury, or by order or direction of the judge, necessarily represent 'bad' decisions to prosecute': Report, para. 6.14. Experienced prosecutors may think the concession somewhat grudging.

Despite all this, there is cause for concern over efficiency when acquittal rates approach 50 per cent.[18]

The twin criteria: (2) conformity to public policy

Public policy regarding criminal law enforcement is a complex matter. There are a number of different strands.

The accusatorial system

Under ideas currently prevailing in England and Wales public policy requires an open, accusatorial, system of criminal justice.[19]).If the court attempts to adopt an inquisitorial role the conviction may be quashed.[20] Committal proceedings are still referred to as an 'inquiry' by 'examining justices' [21] However since the passing of the Summary Jurisdiction Act 1848 even this procedure has not been truly inquisitorial, and the accused may not be examined against his will.

Fairness

Next, current public policy in England and Wales insists that the Crown prosecute, not persecute, the accused. Corresponding requirements of fairness apply at the investigation stage.

The prosecutor must retain a fair and impartial attitude throughout.[22] As the Philips Commission said, it is his job to put the prosecution's case proficiently yet dispassionately.[23] He 'must not struggle for conviction . . . nor be betrayed by feelings of professional rivalry'.[24] He must place before the court all the relevant facts, including those favourable to the accused.[25] This marks a great change from past practice, when many prosecutors browbeat the prisoner, the jury, the witnesses, and sometimes even the court itself.[26]

Law enforcement

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[18] Philips cited figures indicating that in 1978 47 per cent of defendants pleading not guilty in the Crown Court and 50 per cent in the magistrates' courts were acquitted: Report, para. 6.17. In subsequent years the Crown Court acquittal rate has risen to 50%, as follows: 1979, 48% (Judicial Statistics for the Year 1979 (Cmnd. 7977) Table B.7(b) (p. 33)); 1980, 50% (Judicial Statistics for the Year 1980 (Cmnd. 8436) Table B.7(b) (p. 33)); 1981, 50% (Judicial Statistics for the Year 1981 (Cmnd. 8770) Table B.7(b) (p. 28)); 1982, 49% (Judicial Statistics for the Year 1982 (Cmnd. 9065) Table 5.11 (p. 64)); 1983, 50% (Judicial Statistics for the Year 1983 (Cmnd. 9370) Table 5.16 (p. 68)).

[19] The Philips Commission, although given the wide remit of 'the process of the prosecution of criminal offences', found that change to an inquisitorial system, even if it could be shown to be desirable, would be so fundamental in its effect upon institutions that had taken centuries to build as to be impossible on political and practical grounds: Report, para 1.8.

[20] Liddle (1928) 21 Cr. App. Rep. 3. See also Harris [1927] 2 K.B. 587; Clewer (1953) 37 Cr. App. Rep. 37.

[21] Magistrates' Courts Act 1980 s. 5(1).

[22] Sir Norman Skelhorn, Public Prosecutor (1981) p. 39.

[23] Report, para 7.25.

[24] Puddick (1865) 4 F. & F. 497, per Crompton J. at p. 499.

[25] HC Deb (1950) vol. 478 cols. 297-298, per Sir Hartley Shawcross A.-G.

[26] Emlyn, eighteenth-century editor of the State Trials, speaks of prosecutors 'who with rude and boisterous language abuse and revile the unfortunate prisoner; who stick not to take all advantages of him, however hard and unjust, which either his ignorance, or the strict rigour of law may give them; who by force or stratagem endeavour to disable him from making his defence; who browbeat his witnesses as soon as they appear, though ever so willing to declare the whole truth; and do all they can to put them out of countenance, and confound them in giving their evidence: as if it were the duty of their place to convict all who are brought to trial, right or wrong, guilty or not guilty; and as if they, above all others, had a dispensation from the obligations of truth and justice' (Preface to State Trials (2nd edn., 1730), reprinted in T. B. Howell (ed.) State Trials (1816) xxii, at pp. xxiii-xxiv). See further J. Ll. J. Edwards, The Law Officers of the Crown (1964), pp. 54-60.

On the other hand public policy does most emphatically require that the criminal law, whether laid down by Parliament or the courts, be enforced as intended by its creators. Unless enforced, a punitive law is a mere brutum fulmen.[27]

Yet it is impracticable always to prosecute whenever a conviction might be obtained. It may also be unjust. Legislators are deemed to take both these factors into account, and to intend prosecutors to do the same. This brings us to that aspect of public policy known as prosecution policy.

Prosecution policy

The collection of current applied values making up prosecution policy governs the key policy decisions in a particular case. It concerns what Professor Paul Jackson has characterised as the power of a state prosecutor - whatever he be called - to exercise, in effect, the dispensing power denied to the Monarch by the Bill of Rights.[28] Should police enquiries into an alleged or suspected offence be pursued or dropped? What should the charge against a particular suspect be? Should consent to the suspect's prosecution be given? Should a prosecution in fact be instituted? If so, what offence should be charged, and should the proceedings be summary or on indictment? Having been instituted, should the proceedings be withdrawn by the prosecution, or stayed by the court? If it is open to them, should the prosecution appeal against the verdict or sentence?

Given that a conviction is likely, the broad test is whether in all the circumstances a prosecution is required in the public interest.[29] If it is not in the public interest to prosecute in a particular case, then to insist on doing so may well be oppressive.[30]

Prosecution policy must reflect the common *mores*; indeed it can have no other justification. Here we encounter a fundamental problem in law. How is the common *mores* to be discovered? Suppose, on the point at issue, there is truly no agreed opinion? Public policy as discerned and expressed by the judiciary proceeds on the basis that there is necessarily common agreement, whatever evidence may exist to the contrary on a particular issue. Consensus is the only true basis of law. If it does not appear to exist, the judiciary, in arriving at policy, must divine it.

Prosecution policy is not devised by judges, though they have a great deal to do with it. Those responsible for formulating and applying it nevertheless have a function analogous to the judicial function. They too must divine true public opinion, and seek out the consensus. Local sentiment must not be ignored. Failure may lead to prosecution practices which are unjust because largely unsupported by popular opinion.

Prosecuting authorities have in the past shown reluctance to disclose their general policy. The reason was given at a 1975 seminar by Peter Barnes, an Assistant Director of Public Prosecutions:

> 'I hope you will forgive me if I draw a discreet veil over most of this area because, quite apart from not wishing to find myself prosecuted under the Official Secrets Acts, I do not think it would be in the public interest to risk it becoming known that certain

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[27] See Francis Bennion, Statutory Interpretation (1984) s. 13.

[28] 53 Scottish Law Gazette (1985) p. 22.

[29] The test of whether a conviction is likely is officially put as 'whether the evidence is sufficient to justify a prosecution . . . a bare prima facie case is [not] enough . . . [the test is] whether there is a reasonable prospect of a conviction; or . . . whether a conviction is more likely than an acquittal' (Attorney General's Criteria for Prosecution, 1983, para. 4). For criticism of this see Glanville Williams, 'Letting off the guilty and prosecuting the innocent' [1985] Crim L.R. 115; A. Sanders, 'Prosecution Decisions and the Attorney-General's Guidelines' [1985] Crim. L.R. 4.

[30] This is the principal justification for the power of the D.P.P. to take over a private prosecution with a view to aborting it: see Raymond v Attorney General [1982] 2 All ER 487.

offences of medium or minor importance can in fact be committed with relative impunity.' [31]

A further consideration is what might be called the resource factor. Police forces are limited in numbers, and cannot be rapidly enlarged. Public money available to be spent on crime enforcement is also limited. The prosecution process, using expensive skilled manpower, is costly; and the cost can be recovered from defendants only to an insignificant extent. So a prosecution that is otherwise in the public interest may have to be forgone, particularly where the court case would be 'heavy'.[32] Policing factors play an important part in the way prosecution policy is applied in practice.[33]

Other considerations affecting the question whether a particular prosecution is in the public interest can be divided into those which relate to the nature of the offence and those which relate to a person involved.

Policy considerations relating to the offence

Perhaps the most important policy consideration relative to the offence is its degree of gravity: the more serious the offence, the greater the need to prosecute.[34] Other factors are the prevalence of the offence, whether or not the particular incident is 'stale'[35], the need for clearing the air[36], and the desirability of a test case.[37]

A reason for not prosecuting may be that the case is ***de minimis***[38], or that the law in question is obsolete or doubtful, or that the offence concerns a foreign government or is otherwise political.

Ad hominem considerations

What may be called the human factor in prosecution policy can relate to the accused, or to some other person involved - such as the victim of the offence or a witness.

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[31] Institute of Judicial Administration: Edited Transcript of the Proceedings of a Conference on the Prosecution Process held at the University of Birmingham in April 1975 p 30. See also Bernard M. Dickens, (1973) International and Comparative Law Quarterly 1. For the current position see p. 000 below.

[32] Bodkin is said to have regarded the funding of the Office of the Director of Public Prosecutions in his time as inadequate: 'it pained him on occasions that he could not afford to take a case because of the expense it would entail' (Robert Jackson, Case for the Prosecution: A Biography of Sir Archibald Bodkin (1962) p. 172). Funding has scarcely improved, by comparison with the rise in crime.

[33] For a useful discussion of this aspect see A. Sanders, 'Prosecution Decisions and the Attorney-General's Guidelines' [1985] Crim. L.R. 4.

[34] Thus Sir Norman Skelhorn, a former Director of Public Prosecutions, said that there could be no circumstances in which a case of murder would not be prosecuted where the evidence was adequate: Public Prosecutor p. 70.

[35] There is a maxim in the law that vigilantibus non dormientibus leges subveniunt (see Francis Bennion, Statutory Interpretation s. 357). This is reflected in certain statutory provisions that impose time limits for prosecution. Where no such time limit applies, as with most indictable offences, this may be an indication that the legislator does not consider staleness a bar to prosecution. The Prosecution of Offences Act 1985 s. 22 allows regulations to be made laying down maximum time limits for prosecution stages. Field trials for these are under way, and the regulations are likely to be made soon.

[36] Where the circumstances of an offence arouse disquiet, or cause the finger of suspicion to be pointed, it is sometimes thought that a prosecution should be launched to clear the air.

[37] A ground for prosecuting can sometimes be that the authorities consider it expedient to seek a court ruling on some point of doubtful law. This was one reason for the prosecution in Calder & Boyars Ltd. [1968] 3 All E.R. 644, where it was desired to test the so-called public good defence provided by s. 4 of the Obscene Publications Act 1959. (See Sir Norman Skelhorn, Public Prosecutor p. 139.)

[38] See Francis Bennion, Statutory Interpretation s. 348.

Where the accused is in bad health this, if the offence is not grave, may be regarded as a ground for refraining from prosecuting. Other personal factors are age, sex, relationship to the victim, social position, and the existence or otherwise of a criminal record. Policy considerations relative to the victim include willingness to pursue the matter, relationship to the suspect, and state of health.

Considerations applying to a witness again concern relationship, age, and state of health. Where a witness might be harmed by having to give evidence this may be a ground for not prosecuting. It particularly applies to child victims of sex offences, but may arise where the health of any key witness might be impaired, or further impaired, by the strain of testifying, and perhaps undergoing strenuous cross-examination.

Accountability

Finally public policy requires the prosecutor to be fully accountable in respect of his compliance or otherwise with the twin criteria of efficiency and conformity to public policy generally.[39]

Criticisms of present system on policy matters

Regarding accountability, the Philips Commission found the present arrangements unsatisfactory in a number of respects.[40] This applies to accountability both for efficiency and for policy decisions.[41] The lack of power in the Director of Public Prosecutions to issue general directives reduces consistency.[42] Chief officers of police need to be more ready to explain and justify policy decisions to their police authorities.[43] Some prosecuting solicitors have been accused of not observing the fairness requirements.[44] Other criticsms could be levelled, for the truth is that it is remarkably difficult to find out on what basis, and with what justification, some prosecution decisions are taken.

However the main allegation of the unfitness of the present system on policy grounds concerns the fact that most of the policy decisions are effectively taken by the police. The Philips Commission said: 'Criticism focused not only on the use made by the police of their powers of investigation, but also upon the wisdom of leaving the decision to prosecute with the people who did the investigating'.[45] The argument proceeds on two levels: functional and psychological.

The investigator's function is to ferret out the truth; while that of the prosecutor is to assess the evidence, consider the legal position, decide whether the case will stand up in court, and weigh relevant policy considerations. The qualifications and qualities needed are not the same; and are not necessarily found in the same person.

The psychological argument is that the investigator becomes wedded to his investigation. If it convinces him of the suspect's guilt, he may become emotionally committed to securing a conviction. Objectivity suffers, and the investigator may unconsciously shut his mind to arguments telling against the institution of proceedings.[46]

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[39] The Philips Commission discussed the details of accountability in Report, paras. 6.48 to 6.55.
[40] Report, para. 6.56.
[41] Report, para. 6.57.
[42] Report, para. 6.58.
[43] Report, paras. 6.59-6.60.
[44] See, e.g., the remarkable attack by Alec Samuels in Institute of Judicial Administration: Edited Transcript of the Proceedings of a Conference on the Prosecution Process held at the University of Birmingham in April 1975 pp. 74-78.
[45] Report, para 1.3.
[46] The Benson Commission found the need for objectivity a compelling reason for a prosecuting advocate to be in private practice, with wide experience both of defending and prosecuting (Report of the Royal Commission on Legal Services, 1979, Cmnd. 7648, para. 18.44).

The Philips Commission found that a rule insisting on total separation of these two functions of investigator and prosecutor would be impracticable, since the roles 'overlap and intertwine'.[47] Nevertheless the Commission favoured a rule roughly dividing police and prosecutive functions at the stage of charge or issue of summons.[48]

The Crown Prosecution Service

The Government's response was to procure the passing of the Prosecution of Offences Act 1985, which sets up a Crown Prosecution Service for England and Wales as from a date or dates to be appointed.[49] This will be a unified national service.[50]

Composition of the Service The Crown Prosecution Service will be headed by the Director of Public Prosecutions, who will be responsible for its overall management.[51] The Director will be supported by a headquarters staff based in central London, as hitherto. The object will be the maximum delegation to local areas that is consistent with proper accountability.[52]

The Director is required to divide England and Wales into appropriate areas, each of which will be headed by a Chief Crown Prosecutor designated by him.[53] There are likely to be 29 areas in England, of which London (consisting of the Metropolitan Police District and City police area) will comprise three. There will be two areas in Wales. Thirteen areas in England and one in Wales will correspond to an existing police area. The remainder will correspond to two contiguous police areas.

Each Chief Crown Prosecutor will be responsible to the Director for supervising the operation of the Service in his area.[54]

In addition to the Director and the Chief Crown Prosecutors, the qualified legal personnel will consist of barristers or solicitors designated by the Director as Crown Prosecutors.[55] All members of the Service will be civil servants. Subject to instructions given by the Director, every Crown Prosecutor will exercise the powers and functions of the Director as to the institution and conduct of proceedings, the giving of consents, and any other matters.[56]

In addition there is provision for appointing non-members of the Service, being either barristers employed by a public authority or solicitors (whether so employed or not), to institute or take over proceedings on behalf of the Service.[57] These will have the powers of a Crown Prosecutor, but must obey any directions given to them by an actual Crown

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[47] Report, paras 6.30 and 6.31.
[48] Report, para 7.7.
[49] Prosecution of Offences Act 1985 ss. 1(1), 31(2) and (3). It is intended to appoint 1 April 1986 for the six metropolitan counties outside London abolished by the Local Government Act 1985, and 1 October 1986 for the remainder of England and Wales.
[50] Contrary to the recommendation of the Philips Commission, who envisaged a locally-based service for each police area. They held that 'a centralised national system would involve a large bureaucracy and tend to lead to slow and remote decision taking' (Report, para. 9.4.). The Government felt the Commission's system would incur the risk of improper local interference
[51] Prosecution of Offences Act 1985 s. 1(1)(a).
[52] Proposed Crown Prosecution Service (1984, Cmnd. 9411), para. 2. This white paper, issued by the Attorney General, gives details of how cases are intended to be distributed between headquarters and the areas. One result will be to relieve headquarters staff of their present responsibility in a large number of sexual cases (though to aid consistency of treatment headquarters will continue to keep records of material which has been the subject of obscenity proceedings). Allegations against police officers, except in relation to non-fatal motoring offences, will be handled at headquarters. So too will other cases where local influence should not be exerted.
[53] Prosecution of Offences Act 1985 s. 1(1)(b) and (4).
[54] Prosecution of Offences Act 1985 s. 1(1)(b).
[55] Prosecution of Offences Act 1985 s. 1(4). Initially many of these will be drawn from existing prosecuting solicitors' departments.
[56] Prosecution of Offences Act 1985 s. 1(6) and (7).
[57] Prosecution of Offences Act 1985 s. 5(1).

Prosecutor. [58] This power will enable the Service to retain a solicitor in private practice to act in an area with insufficient work to justify the employment of a fulltime Crown Prosecutor. It will also enable public authorities to conduct proceedings themselves where convenient.[59]

Districts and branches What the Act calls an area is likely in practice to be called a 'district'. Each will have its district office. Furthermore a district will have a number of branch offices, each located near a major Crown Court or magistrates' court. The senior Crown Prosecutor in charge of a branch office will be designated Branch Crown Prosecutor. Setting a Direction for the Crown Prosecution Service: a summary by the Director of Public Prosecutions of a report by Arthur Andersen & Co., management consultants, 1985.}

The Director The 1985 Act repeals and replaces the provisions governing the office of Director of Public Prosecutions. From the setting up of the office in 1879 the appointment of the Director has been a function of the Home Secretary. Under the new arrangements he is to be appointed by the Attorney General.[60] This makes sense since he will be required, as hitherto, to discharge his functions under the superintendence of that officer.[61] What this means in practice was described by the holder of the Director's office from 1964 to 1977 as follows-

'[The Director] must in the last analysis take instructions from the Attorney, should he seek to give them. This does not in practice mean that the Director is in any real way inhibited in his ability to make decisions. I cannot conceive of circumstances, for example, where the Attorney would seek to interfere with the day-to-day operations of the Department, although he would from time to time consult with us about matters that might conceivably require his response in Parliament. Indeed we would ourselves have drawn to his attention any matters that seemed to us peculiarly sensitive. I never felt that I lacked the independence to make my own decisions, and in my whole stewardship I never had reason to feel that there was interference from the law officers.'[62]

The Director is required to make an annual report to the Attorney General, which must be published.[63]

Functions of the C.P.S. It will become the duty of the Director, and therefore will from the start be the duty of the new Service generally, to take over the conduct of all criminal proceedings (other than 'specified proceedings') which are instituted on behalf of a police force, whether by a member of that force or by any other person.[64]

This is the crucial new provision designed to satisfy the recommendation of the Philips Commission that there should be a rule roughly dividing investigative and prosecutive

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[58] Prosecution of Offences Act 1985 s. 5(2).

[59] In effect a person appointed under s. 5 will be the prosecutor. The power of any prosecutor to retain private-practice counsel or solicitors to represent him is unaffected by the 1985 Act, and not mentioned in it.

[60] Prosecution of Offences Act 1985 s. 2(1).

[61] Prosecution of Offences Act 1985 s. 3(1).

[62] Sir Norman Skelhorn, Public Prosecutor 125 (emphasis added). Whether this degree of de facto freedom from ministerial supervision is right in a civil service department may be questioned.

[63] Prosecution of Offences Act 1985 s. 9.

[64] Prosecution of Offences Act 1985 s. 3(2)(a). The definition of 'specified proceedings' in s. 3(3) says that these are proceedings specified by order made by the Attorney General. The order is likely to specify a large number of minor offences where, with a view to a hearing in the absence of the accused, a written plea of guilty is entered under the Magistrates' Courts Act 1980 s. 12. The phrase 'on behalf of a police force' is designed to exclude the case where a police officer prosecutes on his own account (e.g. for an off-duty assault committed on him by a neighbour).

functions at the stage of charge or issue of summons.[65] The Home Secretary is given power to extend it to bodies of constables other than regular forces.[66]

To supplement this provision the Act enables regulations to be made requiring chief officers of police to notify the Director of serious offences alleged to have been committed in their area as to which there is a prima facie case for prosecution, but where the police do not intend to lay a charge or information.[67]

The Act goes on to reproduce more or less unchanged the existing functions of the Director. He (and therefore the Service as a whole) is to institute and have the conduct of any criminal proceedings where because of the importance or difficulty of the case, or for some other reason, that is appropriate.[68] Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage.[69]

These are the main powers and duties of the Director and his new Service, but for completeness the following should also be mentioned:

To take over the conduct of binding over proceedings instituted by the police. [70]

To take over the conduct of forfeiture cases under the Obscene Publications Act 1959 s. 3.[71]

To give advice to police forces on matters relating to criminal offences.[72]

To appear for the prosecution, when so directed by the court, on any criminal appeal from the High Court or Crown Court, or on an appeal from a magistrates' court in a contempt case.[73]

To consider taking over a prosecution begun (otherwise than by the police) in a magistrates' court but discontinued, where there is no satisfactory reason for the prosecutor's withdrawal or failure to proceed.[74]

To discharge such other functions as may from time to time be assigned by the Attorney General.[75]

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[65] See p. 000 above. It will be noted that the Act makes no attempt to lay down at what precise point the Director is to 'take over the conduct'.

[66] Prosecution of Offences Act 1985 s. 3(3). It is expected that all such bodies will be included, thus bringing in such forces as the Ministry of Defence Police, the British Transport Police, the Royal Parks Police, and even such out of the way corps as the university 'bulldogs' appointed under the Oxford Police Act 1881 s. 23.

[67] Prosecution of Offences Act 1985 s. 8(1). Section 8(2) enables regulations to be made under which the Director may obtain from chief officers information on any offence he chooses to specify.

[68] Prosecution of Offences Act 1985 s. 3(2)(b). This will include both prosecutions that would otherwise be instituted by the police (and later taken over by the Director), and those that would otherwise be instituted by a government department, local authority, or other official agency.

[69] Prosecution of Offences Act 1985 s. 6(2). This will mainly apply to private prosecutions, which are to continue to be permissible (Prosecution of Offences Act 1985 s. 6(1)). Note that this power to take over does not apply where, by inadvertence or design, a prosecution that the Director should have instituted is in fact instituted by someone else. Note further that even a police prosecution, until the point at which it is taken over by the Director, will continue to be 'private'.

[70] Prosecution of Offences Act 1985 s. 3(2)(c).

[71] Prosecution of Offences Act 1985 s. 3(2)(d).

[72] Prosecution of Offences Act 1985 s. 3(2)(e).

[73] Prosecution of Offences Act 1985 s. 3(2)(f).

[74] Prosecution of Offences Act 1985 s. 7(4). The duty is not spelt out in the Act, but arises by implication from the duty to notify placed by s. 7(4) on justices' clerks. This is a safeguard, less important now than in former times, against the bribery or intimidation of a private prosecutor.

[75] Prosecution of Offences Act 1985 s. 3(2)(g). Functions likely to be assigned include carrying on prosecutions instituted under the Offences against the Person Act 1861 s. 42 by assault victims, and acting on behalf of foreign governments in extradition cases.

The Office of the Director of Public Prosecutions has never had its own staff of investigators, and that will continue to be the position of the new Service.

Rights of audience Under the rules of etiquette of the Bar, employed barristers cannot act as advocates. The Act therefore confers on Crown Prosecutors who are barristers the same rights of audience as are possessed by solicitors holding practising certificates. Crown Prosecutors who are solicitors will continue to require a practising certificate, though probably at a reduced fee.[76] The ordinary rights of audience possessed by solicitors with practising certificates include those enjoyed in the Crown Court by direction given by the Lord Chancellor under the Supreme Court Act 1981 s. 83.[77]

Prosecution guidelines The 1985 Act marks a departure from the traditional official view that the less said in public about the content of prosecution policy the better.[78] It requires the Director to issue a Code for Crown Prosecutors giving guidance on general principles to be applied by them in the following circumstances.[79]

In determining, in any case, whether proceedings for an offence should be instituted, and if so what charges should be preferred.

In determining, where proceedings have already been instituted, whether they should be discontinued.

In considering, in any case, representations to be made by them to any magistrates' court about the mode of trial suitable for that case.[80]

There is room to make only one further point by way of rounding off this discussion. The new arrangements show no sign of remedying a notorious defect in the present system. On matters of deep public concern such as a national strike, it will become no easier than before to find out why evidence is not being gathered with a view to the prosecution of leading figures involved in organising criminal activities (for example intimidatory mass picketing).[81] On questions of whether or not to investigate, even where the criminal activity is on a national scale, the police it seems will continue to decide. And it will not be possible effectively to challenge their decisions.

Theoretically at least, this incapacity extends even to the Law Officers and the D.P.P. The official position was expressed as follows by the Attorney General, Sir Michael Havers, in connection with the miners' strike in 1984:

' ... it is not part of the functions of the Director of Public Prosecutions to investigate alleged or suspected criminal offences, nor does he have the facilities to do so. That is the province of the police. If and when a Chief Officer of Police refers a particular case to the Director of Public Prosecutions for consideration whether to institute, or authorise the institution of, criminal proceedings, the Director of Public Prosecutions may be in a position to advise as to

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[76] Prosecution of Offences Act 1985 s. 4(4) and (5). The provision in the Solicitors Act 1974 s. 88 relieving civil service solicitors from the need to hold a practising certificate is disapplied by s. 4(4). The fee reduction would recognise that some services of the Law Society financed by these fees relate only to private practice (e.g. institutional advertising).

[77] The Prosecution of Offences Act 1985 s. 4(3) authorises the Lord Chancellor to direct the giving of additional Crown Court rights of audience to Crown Prosecutors, but this power is unlikely to be exercised.

[78] As to this view see p. 000 above. The Attorney General, Sir Michael Havers, had signalled the departure by issuing in February 1983 a six-page memorandum headed Criteria for Prosecution (see A. Sanders, 'Prosecution Decisions and the Attorney-General's Guidelines' [1985] Crim. L.R. 4).

[79] The Code is likely to follow closely the Attorney's 1983 Criteria for Prosecution.

[80] Prosecution of Offences Act 1985 s.10. The provisions of the Code, and of any alterations made in it, must be included in the Director's published annual report.

[81] See Francis Bennion, 'Mass Picketing and the 1875 Act' [1985] Crim L.R. 64.

any further evidence that may be needed, or would be helpful, before he can take his decision or at a later stage of the contemplated proceedings. But it is not his business to direct the police as to how such evidence should be obtained or to require them to obtain it. Still less is it in the power of the Director of Public Prosecutions to require a Chief Officer of Police to mount an investigation into a case which has not been referred to him but where it is alleged or suspected by others that a crime may have been committed.' [82]

While that is the official doctrine, both at present and as will be the case under the new arrangements, it seems that the factual position is somewhat different. Cases are frequently reported in the press where the D.P.P. is said to have required the police to investigate a suspected offence.[83]

If in practice the D.P.P. habitually gives the police instructions to investigate which it would be unthinkable for them to disobey, why has the opportunity not been taken to regularise this? The true constitutional position seems to be that the prosecutive power of the state is vested in the Attorney General, with the Director of Public Prosecutions and his staff acting as the Attorney's executive arm. In these circumstances there ought to be no doubt as to the legal power of these central authorities to order a police investigation wherever they think fit. In the case of weighty crimes committed on a national scale it is surely incontrovertible that this should be so.

[82] Letter to the present author dated 20 September 1984 (emphasis added). In a further letter dated 16 October 1984 the Attorney General said: 'It is certainly not for me or the Director of Public Prosecutions to direct [a Chief Officer of Police] as to the sort of crime he ought to be investigating or how he ought to do it. You state: 'If you required the police to secure and produce the evidence necessary here ... they would surely be obliged to comply'. That simply is not so.' (Both extracts are reproduced by kind permission of the Law Officers' Department.)

[83] For example The Times of 17 October 1985 said in relation to alleged breaches of the Official Secrets Act by Mr Cecil Parkinson: 'Sir Thomas Hetherington, Director of Public Prosecutions, yesterday ordered Scotland Yard to investigate'. It went on to give verbatim a statement from the D.P.P.'s office saying that the Director 'has asked the Metropolitan Police to carry out an investigation'.